

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JAMES S. PHELPS
Claimant

VS.

COLONIAL PARK TOWNHOUSES COOP.
Respondent

AND

TIG INSURANCE CO.
Insurance Carrier

Docket No. 270,814

ORDER

Claimant requests review of a preliminary hearing Order Denying Temporary Total Compensation entered by Administrative Law Judge Brad E. Avery on September 17, 2002.

ISSUES

The Administrative Law Judge (ALJ) denied the claimant's request for temporary total disability compensation because claimant failed to prove notice was given within 10 days as required by K.S.A. 44-520.

The sole issue raised on review by the claimant is whether or not the claimant gave notice within 10 days. Claimant contends he gave notice of his August 1, 2001 injury to his supervisor on August 6, 2001, and requests the Board reverse the ALJ's Order denying benefits.

Conversely, respondent notes this is the second review by the Board of this case. In the prior review the Board affirmed the ALJ's finding claimant failed to give timely notice and respondent argues because there is no new evidence to support claimant's contention that he gave timely notice the ALJ's denial of benefits should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

This is the second Board review of a preliminary hearing in this case. On February 26, 2002, the ALJ had determined claimant failed to provide timely notice within 10 days of his accident. On April 25, 2002, the Board affirmed that decision. On September 16, 2002, a second preliminary hearing was held. The parties agreed the transcript of the first preliminary hearing held on February 26, 2002, would be considered part of the record of the second hearing. Following the hearing, the ALJ again determined claimant had failed to give timely notice within 10 days and denied benefits.

The Board's Order dated April 25, 2002, contained the following recitation of the facts:

Claimant began working for respondent in April 2001 as a maintenance worker.

Claimant alleges he suffered a sudden onset of pain on August 1, 2001, while soldering and reaching above his head. There is a dispute between claimant and Jack Gann, Jr., respondent's manager, regarding whether claimant advised Mr. Gann of the injury. Claimant testifies he did, in fact, advise Mr. Gann. Mr. Gann testified he has no recollection of that conversation.

Claimant's history is significant in that he suffered back problems for several years prior to his employment with respondent. A medical report from April 6, 1998, indicates claimant had ongoing back pain in his mid to low back. The April 4, 1998 back diagram prepared by claimant shows a two-year history of back pain in the thoracic spine.

Claimant was receiving treatment at the Holton Family Health Clinic with Roy P. Hall, M.D., on July 25, 2001. At that time, claimant was experiencing ongoing back complaints.

Claimant's next appointment with Dr. Hall was on August 6, 2001. At that time, claimant indicated his back was no better. There was no mention in that medical note of a work-related accident on August 1, 2001.

Claimant's history is also significant in that, on January 19, 2000, he underwent a medical evaluation for the purpose of obtaining Social Security disability benefits. Included in the long list of claimant's ongoing problems was a history of back pain.

Claimant was examined by Sergio Delgado, M.D., on December 12, 2001, at the request of Cheryl Bohl, the claims representative for respondent's insurance company. At that time, Dr. Delgado was provided medical records from numerous medical providers, including an orthopedic clinic and an orthopedic and sports

medicine clinic. Included in the medical records was a long history of ongoing back complaints. When Dr. Delgado questioned claimant regarding his past history, Dr. Delgado noted claimant left out numerous instances of prior back problems. Claimant failed to mention the back complaints which occurred in July 2001, just before the alleged accident with respondent. Dr. Delgado opined that the incident alleged by claimant on August 1, 2001, would, in his opinion, rarely cause chronic persistent complaints to the mid and low back. He stated that claimant should have responded to conservative care by this time.

At the second preliminary hearing, the claimant proffered the testimony of Lynn Tuck, an employee at Bolz Lucas Chiropractic office. Ms. Tuck testified that respondent's manager, Jack Gann, had called the office on August 27, 2001, to schedule an appointment for claimant. Although Ms. Tuck was under the impression it was a workers compensation matter, she admitted Mr. Gann did not indicate the employer would pay for the treatment or where claimant had been injured. She noted Mr. Gann called in and said he had an employee who was hurt and he wanted to make an appointment. Nothing was said about how the employee was hurt.

Mr. Gann, also testified at the second hearing and agreed he had scheduled the chiropractic appointment but that he had not indicated it would be paid for by respondent. At the first preliminary hearing, Mr. Gann had explained how the subject of chiropractors had come up and how he had offered to get claimant an appointment at his personal chiropractor's office. There is nothing in the testimony of Ms. Tuck that contradicts that testimony.

Mr. Gann also agreed that claimant had received wages through August 17, 2001. At the first preliminary hearing Mr. Gann had testified he did not offer to pay claimant wages or workers compensation while claimant was unable to work. At the second preliminary hearing, Mr. Gann testified he was aware claimant was going through a tough time and the payments through August 17, 2001, were made because claimant worked and perhaps claimant was incorrectly paid for sick leave during that time frame.

Claimant argues the new testimony undermines Mr. Gann's credibility to the point that his denial that he was provided notice should be discounted. The Board disagrees. There is nothing in the additional testimony that supports claimant's contention that he gave timely notice to Mr. Gann on August 6, 2001. Moreover, there simply is not a variance in Mr. Gann's testimony sufficient to undermine his credibility. The Board finds claimant failed to provide timely notice of accident as required by K.S.A. 44-520 and affirms the ALJ.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Order of Judge Brad E. Avery dated September 17, 2002, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of December 2002.

BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
Kevin Kruse, Attorney for Respondent
Brad E. Avery, Administrative Law Judge
Director, Division of Workers Compensation